arrogated to himself the right to receive the whole of the income and, on his own unequivocal confirmation, did receive and use it. When his own business, Stamford College, required funds, he transferred from time to time vast sums of money from City School-Arts to Stamford College and, as I have demonstrated, what he drew from City School-Arts far exceeded his credit balance in the capital account (assuming that the respective partners' shares of the rental income had been credited to his and Eric's accounts at the material time) and, in my view, he thus trenched on or impaired Eric's possession and enjoyment of the gift, ie the 40% equitable interest in the property.

In my view, in the circumstances, the Commissioner of Estate Duties was fully justified in including the subject matter of the gift as part of the dutiable estate of the deceased. With regard to the prayers in the originating summons, I agree with the defendant that there was no issue in prayer 1, as the Commissioner of Estate Duties agreed that the property was and is a partnership property. As for prayer 2, I am clearly of the opinion that in the circumstances that had happened estate duty was payable under s 8(c) of the Estate Duty Act on the 40% equitable interest in the property. The plaintiff will have to pay the costs of these proceedings.

*Order accordingly.*

Solicitors: *Cooma Lau & Loh & M Karthigesu.*

Reported by *PS Ranjan*

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## Lai Ah Kau & Anor v Public Prosecutor

HIGH COURT (SINGAPORE) – MAGISTRATE'S APPEAL NOS 81 & 82 OF 1984
CHUA J
6 SEPTEMBER 1988

*Companies and Corporations – Moneys of company – Whether directors are trustees thereof – Whether person in total control of company by reason of shareholding and directorship is capable of stealing property of company – Drawing by shareholders of profits otherwise than by dividend – Whether dishonest – Whether fraud committed on company – Companies Act (Cap 50, 1985 Ed), ss 157(1) & 199(1)*

*Criminal Law – Criminal breach of trust – Moneys of companies paid out as fictitious contractual payments to subcontractor – Finding of dishonesty in relation to the revenue – Whether there was also wrongful loss to the companies – Penal Code (Cap 103, 1970 Ed), ss 34, 405 & 409*

The appellants, who were directors and shareholders of certain companies, implemented a scheme to withdraw money from the companies for the purpose of an earlier withdrawal and distribution of their expected profits otherwise than in the proper way by declaring dividends. The scheme involved the use of fictitious contracts and vouchers by which moneys purportedly to pay a subcontractor's bills were drawn out and paid eventually to the appellants. The magistrate who tried the case found that the exercise of withdrawing the funds from the companies was dishonest and also found that there was dishonesty on the part of the appellants in relation to the Revenue in that they evaded payment of income tax on the disguised payments. Both appellants were convicted of several charges of criminal breach of trust and abetment of criminal breach of trust in respect of transactions arising out of the scheme.

The issues raised in the appeals were: (1) whether the appellants did misappropriate the property of the companies within the meaning of s 405 of the Penal Code; and (2) if they did, whether they did so dishonestly within the meaning of s 405 of the Code.

It was submitted for the appellants that the finding of dishonesty vis-à-vis the Revenue was not the requisite finding of dishonesty required by s 405 of the Code for criminal breach of trust because what had to be found was dishonesty vis-à-vis the company. It was further submitted that there was no misappropriation because: (1) there was no intention on the part of the appellants to cause wrongful loss to the companies as the appellants did not consider their companies to be 'other persons'; and (2) there was no intention on the part of the appellants to cause wrongful gain in relation to the companies as the money taken represented profits and as shareholders the appellants honestly believed that they were entitled to take the money as profits.

**Held,** dismissing the appeals:

(1) The directors of a company are trustees as to the moneys of the company which come to their hands or under their control and can be proceeded against for misapplication of the funds of the company.

(2) A person in total control of a limited liability company, by reason of his shareholding and directorship is or, two or more persons acting in concert, are capable in law of stealing the property of the company.

(3) The defence that the sums taken out represent 'profits' was untenable. The act of appropriation was dishonest. The appellants had caused wrongful loss to the companies in that the companies had paid out various sums of money as contractual payments when there were no such contracts. If these sums were to be taken as profits, the proper procedures in the Companies Act had to be followed. By secretly taking out these large sums of money for themselves, the appellants as agents of their companies had committed fraud on their own companies. In disguising these payments as payments to subcontractors, the appellants had not only caused wrongful loss to their respective companies but they had also caused wrongful gains to themselves. Had the accounts been properly audited and a profit and loss account put up, their entitlements would have been less than what they had arrogated to themselves.

**Cases referred to**

1 *R* v *Arthur* [1967] 111 SJ 435 (folld)
2 *Attorney General's Reference (No 2 of 1982)* [1984] 2 All ER 216 (folld)
3 *Belmont Finance Corporation Ltd* v *Williams Furniture Ltd* [1979] 1 All ER 118 (folld)

**Legislation referred to**
Companies Act (Cap 50, 1985 Ed) ss 157(1), 199(1)
Criminal Procedure Code (Cap 113, 1970 Ed) s 375
Penal Code (Cap 103 1970 Ed) ss 34, 109, 405, 409
Companies Act 1948 [UK] s 54
Theft Act 1968 [UK] ss 1(1), 2(1)(b)

*George Newman* QC (*Peter Yap* with him) for the first appellant.

*George Newman* QC (*P Fernando* with him) for the second appellant.

*Lawrence Ang* (*Yang Ing Loong* with him) for the respondent.

*Cur Adv Vult*

**Chua J:** The first appellant, Dr Lai Ah Kau, was tried on:

(1) five charges that he, in his capacity as the Managing Director of Sino British Construction Co Pte Ltd (SBCPL), together with Julia Liew Kum Cheng and in furtherance of the common intention of both of them committed criminal breach of trust with regard to funds belonging to SBCPL totalling $261,000 contrary to s 409 read with s 34 of the Penal Code (Cap 103, 1970 Ed);
(2) six charges of abetting the offence of criminal breach of trust committed by the second appellant in his capacity as Managing Director of Wein Kee Construction Pte Ltd (WKCPL) with regard to funds belonging to WKCPL totalling $282,800 contrary to s 409 read with s 109 of the Penal Code.

The second appellant, Lee Foong Fatt, was tried on:

(1) five charges of abetment of the offence of criminal breach of trust committed by the first appellant in respect of the five charges of criminal breach of trust against the first appellant totalling $261,000;
(2) nine charges of criminal breach of trust in his capacity as Managing Director of WKCPL on the same date and with reference to the same amount referred to in the charges preferred against the first appellant for abetting the second appellant of which three charges against the first appellant were stood down.

At the end of the trial both the appellants were convicted on all the charges. The first appellant was sentenced to eight months' imprisonment on each charge, the sentences to run concurrently. The second appellant was sentenced to ten months' imprisonment on each of the criminal breach of trust charges and eight months' imprisonment on each of the abetment of criminal breach of trust charges, the sentences to run concurrently.

The following facts are set out in the signed statement (exh D58), in which the two appellants admitted to the facts therein, tendered by counsel for the two appellants pursuant to the provisions of s 375 of the Criminal Procedure Code (Cap 113, 1970 Ed):

*Sino British Construction Pte Ltd (SBCPL)*

The first appellant was the Managing Director of SBCPL which was incorporated in June 1980. The total share allotment as of 19 March 1981 was 1,000,000 shares. All these shares were by June 1981 fully paid up at its par value of $1 per share. In June 1981 the respective shareholdings were as follows:

| | | |
|---|---|---|
| (a) first appellant | ... | 500,000 shares |
| (b) Julia Liew Kum Cheng ('Julia') | ... | 400,000 shares |
| (c) Leong Kok Keong ('KK Leong') | ... | 100,000 shares |

Of the 500,000 shares held by the first appellant, 50% of these were beneficially owned by the second appellant. The 400,000 shares held by Julia were beneficially owned by her father Liaw York Kow ('Liaw'). The 100,000 shares held by KK Leong were beneficially owned by his brother Richard Liong Kuo Chi ('Richard Liong').

The first appellant was appointed a Director and the Managing Director of SBCPL on 18 March 1981, the other two directors were Julia and KK Leong. Liaw was appointed General Manager of SBCPL, Julia the Company Secretary and KK Leong the Chairman.

On 25 August 1981, Julia transferred two lots of 50,000 shares in her name to KK Leong and from that date 200,000 shares were registered in KK Leong's name with Richard Liong as the beneficial owner.

On 2 January 1982, KK Leong resigned as Director and Chairman and was replaced by his brother Richard Liong in both capacities.

On 30 April 1982, Liaw was dismissed as the General Manager of SBCPL by the Board of Directors and on that date Julia resigned as the Company Secretary. On 19 June 1982, Julia was dismissed as a Director of SBCPL by the Board of Directors.

*Wein Kee Construction Pte Ltd (WKCPL)*

WKCPL was incorporated in December 1980. As on 29 January 1981, the shareholders were:

| | | |
|---|---|---|
| (a) Chiang Saik Kai ('Chiang') | ... | 50,000 |
| (b) Second appellant | ... | 50,000 |
| (c) KK Leong | ... | 50,000 |

These shares were allotted at par value of $1 per share and had been fully paid up.

On 6 July 1981, the second appellant was allotted a further 50,000 shares at par value of $1 per share. This was fully paid up by the second appellant.

On 17 July 1981, Chiang's 50,000 shares were transferred to Patricia Liaw Kum Fun ('Patricia'), the younger sister of Julia.

Of the 100,000 shares held by the second appellant, 50% of these shares were beneficially owned by the first appellant. The 50,000 shares held by Patricia were beneficially owned by her father Liaw. These shares previously held by Chiang were also beneficially owned by Liaw. The 50,000 shares held by KK Leong were beneficially owned by his brother Richard Liong.

Both Chiang and the second appellant were the directors of WKCPL at all material times. On 17 May 1982, Richard Liong was appointed the Company Secretary replacing Ling Suay Hwa.

In 1981 SBCPL and WKCPL, between them, had been awarded building contracts worth $80 million.

SBCPL had an account with DBS Bank, Shenton Way Branch. The account was opened on 1 April 1981. The signatories for this account were (a) first appellant or KK Leong (group A); (b) Julia or Liaw (group B). The cheque signatories required were one from group A and one from group B.

On 30 April 1982, following Liaw's dismissal as General Manager the signatories were (a) first appellant in group A; (b) Richard Liong or Julia in group B.

*Conduct of the company's affairs in SBCPL and WKCPL*

The representative interests of SBCPL were that (1) the first appellant spoke for himself and the second appellant; (2) Liaw spoke for himself (by reason of his beneficial interest) and for Richard Liong.

As regards WKCPL, (1) the second appellant spoke for himself and for the first appellant; (2) Liaw spoke for himself (by reason of his beneficial interest) and for Richard Liong.

Over a series of discussions at various times between the first appellant and Liaw, between the second appellant and Liaw and between the first appellant and the second appellant, separately or together with Liaw, an understanding was reached between the first appellant, the second appellant and Liaw with regard to the conduct of the affairs of SBCPL and WKCPL including the distribution of profits. At no time were Julia or Patricia or Richard Liong directly involved in these discussions.

For all intents and purposes the two companies were run as if in two groups – the Liaw group (Liaw, Julia, Patricia & Richard Liong) and the appellants' group.

A scheme to withdraw money from the two companies was introduced by Liaw to the two appellants for the purpose of an earlier withdrawal and distribution of their expected profits. The scheme was to use fictitious contracts and the moneys obtained therefrom would be for distribution between the Liaw group and the appellants' group. The appellants agreed to the scheme.

It was agreed that the distribution of the moneys derived from the use of the fictitious contracts was to be as follows:
(a) 40% to the Liaw group, incorporating Richard Liong's share.
(b) 60% to the appellants' group to be divided between the two appellants. The additional 10% to the appellants' group was for the additional financing responsibilities and burden provided by the two appellants to DBS Bank.

In pursuance of the scheme two fictitious contracts and vouchers were prepared – SBCPL subcontract with Thian Jun Soon; WKCPL subcontract with Thian Jun Soon.

The first and second appellants admit having received from Julia the moneys distributed in pursuance to the scheme. All the moneys so withdrawn were from the profits of the companies. The companies were solvent and were 'cash rich' at all material times.

Subsequent to Liaw's dismissal on 30 April 1982, the arrangement continued with Richard Liong speaking and acting on behalf of the Liaw group.

The companies were operated in an informal manner as typified below:
(a) loans extended by the first and second appellants to the companies were made without compliance with formal procedure. There were no company resolutions. Repayments were also made from these companies to them without compliance with formal procedure. There was also no company resolution to give effect to these repayments;
(b) moneys withdrawn from both companies were also not in compliance with formal procedures, eg directors fees/loans;
(c) the primary object of SBCPL in particular which was to take over the business of SBC was not complied with.

These two companies were run as if they were a partnership of two groups.

At the close of the prosecution and having regard to the evidence of Julia, Thian Jun Soon and in particular exh D58, the admission of both the appellants, the trial court was satisfied that the prosecution had made out a case against both the appellants on all the charges preferred against them which, if unrebutted, would warrant their conviction.

In his defence, the first appellant, a medical doctor who is no longer in medical practice, maintained that when he became Managing Director of SBCPL, that was the first time he was involved actively in the running of a company, both as a shareholder and as a director.

He admitted that he received all the moneys, the subject matter of the eight charges of criminal breach of trust as agent of SBCPL preferred against him, but claimed that he was entitled to them, being his share of the profits of the company. He further maintained that the various sums which he received were exactly 30% of each of the amounts withdrawn, which were progress payments consisting of the profits of the company and that the progress payments contained identifiable portions, being the profits of the company which, according to him, he was entitled to.

In his defence, the second appellant similarly admitted that he received all the moneys, the subject matter of the nine charges of criminal breach of trust as agent of WKCPL. Similarly, he maintained that the moneys represented exactly 30% of the profits of the company and were his as of right.

It was the case of the defence before the trial court that both the appellants had acted in the belief that they were entitled to the profits of the company and it was submitted that that was sufficient to negate any dishonest intention on their part. It was further contended by the defence that, in the context of the law relating to the offence of criminal breach of trust, there exists a claim by shareholders to entitlement of the profits of the company and that for as long as there exists such a right or entitlement, the beneficial interest in the profits exists and remains for the benefit of the shareholders. Being shareholders, the two appellants cannot be said to have committed the various offences of criminal breach of trust as the property in question is neither the property of some

other person nor that the beneficial interest in or ownership of it is in some other person.

The issues raised in this appeal resolve themselves into two principal questions:

(i) Did the appellants misappropriate the property of the companies within the meaning of s 405 of the Penal Code?

(ii) If they did, did they do so dishonestly as required by s 405 of the Penal Code?

The main point taken by Mr Newman for the two appellants is that dishonesty for the purpose of s 405 has not been proved.

The relevant portion of s 405 reads:

> Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property ... commits 'criminal breach of trust'.

'Dishonesty' is defined in s 24 of the Penal Code as follows:

> Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing dishonestly.

The trial judge in his grounds of decision dealt with the law as follows:

> It is clear from the decided authorities that a director of a company is an agent of the company. From the evidence of Julia Liew (PW12) who clearly was an accomplice, there was a conspiracy between her father Liaw York Kaw and the first and second accused to siphon funds from both these companies.

The trial judge then dealt with the facts and concluded:

> On the evidence before the court, it was clear that the proceeds of the siphoned funds were shared by the first accused, second accused and the Liaw family on a 30-30-40 basis. There was no doubt on the evidence that Julia Liew (PW12) and her father Liaw York Kaw were involved in the siphoning of the moneys together with the two accused. There was ample evidence to suggest it was Liaw and through him Julia Liew who were responsible for introducing the scheme to SBCPL. (The prosecution had chosen not to call Liaw York Kaw as a witness, something which they could do in the exercise of their discretion.) Both accused had acted jointly in the scheme which was designed to benefit both of them as well as the Liaws. To the court's mind, the defence contention that both accused had acted without dishonest intention is certainly not consistent with what Thian Jun Soon (PW2) had been asked to do. In fact, on the day after the second accused had been picked up by the CPIB for questioning, he and his brother Lee Hong Whatt literally ordered Thian to pack up and return to Sarawak immediately, which Thian did. It was also suggested by the defence that the two accused were obviously looking for a convenient way whereby an earlier distribution of their profits could be achieved. Instead of by way of formal processing of declaration of dividends they had, through means which were not denied as irregular, sought to take out their entitlements as and when convenient.

The trial judge then referred to a part of the evidence including the answers given by the first appellant to the effect that the arrangements were part of a scheme to pay less tax:

> Q: Is it your testimony that you honestly believed that you were entitled to have the moneys when you took the proceeds of these 11 cheques?
> A: Yes. These are the profits of the company. To my mind I was the company and the company was mine. Therefore when the company makes a profit, I am entitled to the profits.
> Q: Therefore, there was nothing to be afraid of?
> A: That is so.
> Q: It follows therefore there was nothing to hide from?
> A: I agree, so long as they were profits.
> Q: Why was there a need to camouflage these payments as payments to PW2?
> A: When Liaw York Kaw introduced these arrangements to me, part of them was to pay less tax. This was the main consideration that prompted me to agree to this arrangement. I was thus able to take out my money earlier.
> Q: You knew therefore that there was something wrong with the scheme to siphon funds from the company?
> A: Yes, to a certain extent it was irregular.

The trial judge concluded:

> The first accused had admitted that the fictitious contracts and arrangements were in relation to a scheme to pay less tax. Both accused being shareholders had to pay tax for profits that were declared to them. To the court's mind, the suggestion by the prosecution that by disguising these payments as subcontractor's payments both accused had avoided paying 40% tax on profits to the Comptroller of Income Tax, which clearly showed the dishonesty on their part, was certainly properly made and accepted by the court.

Mr Newman submits that the trial judge expressly found dishonesty on the part of the appellants in relation to the Revenue in that they evaded payment of income tax on the disguised payments. He submits that the finding of dishonesty vis-à-vis the Revenue is not the requisite finding of dishonesty required by s 405 for criminal breach of trust because what has to be found is dishonesty vis-à-vis the company.

Mr Newman submits that there was no misappropriation because (i) there was no intention on the part of the appellants to cause wrongful loss to the companies as the appellants did not consider their companies to be 'other persons'; (ii) there was no intention on the part of the appellants to cause wrongful gain in relation to the companies as the money taken represented profits and as shareholders the appellants honestly believed that they were entitled to take the money as profits.

It is not correct to say that the appellants' conduct was found by the trial judge to have been dishonest only in respect of the Revenue. The trial judge found that the whole exercise of withdrawing the funds from the companies was dishonest and that the scheme to avoid paying tax showed up their dishonesty.

The directors of a company are trustees as to the moneys of the company which come to their hands or under their control and can be proceeded against for misapplication of the funds of the company.

In *R* v *Arthur*,[1] the defendant, a director and holder of approximately three-quarters of the shares in a company which bought his personal insurance brokerage business, was charged, inter alia, on six counts each alleging fraudulent conversion of £1,000 of money received by him for and on account of the company, which he admittedly took out of profits, the company being solvent, at half-yearly intervals, and no record was made in the company's books which included an expense account. He alleged it was taken with the knowledge of his co-director, B, who had approximately one-quarter of the shares and that B had had £250 of each sum (B denied the contention) and that the money was not taken dishonestly to defraud the company but either as a loan or remuneration, and that any irregularity could have been rectified by a company resolution; he contended also that the money was taken for expenses and, although the defendant himself denied it, his counsel submitted that the jury might think there was an intention to defraud the revenue.

Cusack J directed the jury that the essence of the charge was whether the abstraction of the money was done honestly or dishonestly. After retiring for over two hours the jury returned asking whether, if the defendant took the £1,000 'with someone else's consent and agreement and subsequently gave £250 away to that other person, again with his agreement, using the £750 for his own purposes, would be guilty of fraudulently converting the whole £1,000, or should we find him guilty of fraudulently converting only £750?' They were directed that, in those circumstances, it would only be safe to convict him of converting £750. They convicted him of fraudulent conversion of £750 on each count.

The defendant appealed, contending that fraud meant fraud on the minority of shareholders and that the position changed immediately the money was shared among the shareholders, and that the jury should have been so directed.

Sellers LJ in his judgment said that undoubtedly there were cases in company law in which some irregularity, or misfeasance by a director to directors, would not be criminal and could, in appropriate circumstances, be put right by suitable resolutions, but they did not touch this case, and each of them distinguished the position if fraud or dishonesty had been established; they did not assist the defendant. The company was prejudiced by not having the money to meet obligations and by there being no record of it; there was fraud on the company because it was a separate entity consisting of more shareholders than the defendant and B. Clearly in law there was no defence on the lines taken. The appeal was dismissed.

A person in total control of a limited liability company, by reason of his shareholding and directorship or two or more such persons acting in concert, are capable in law of stealing the property of the company.

In *Attorney General's Reference (No 2 of 1982)*[2] two defendants were charged, either individually or jointly, on a number of charges with theft of large sums of money from companies wholly owned and controlled by them. At the close of the prosecution's case the judge formed the view that the defendants were the company and therefore could not steal from it, and accordingly withdrew the case from the jury and directed the acquittal of both defendants. The Attorney General referred to the Court of Appeal for its opinion the questions whether a person in total control of a limited liability company, by reason of his shareholding and directorship, or two such persons acting in concert, were capable of stealing the property of the company.

At the hearing of the reference the defendants submitted that, although the ingredients of theft under s 1(1) of the Theft Act 1968 had otherwise been prima facie satisfied, they had been entitled to believe that the companies would have consented to the appropriations and therefore under s 2(1)(b) of the 1968 Act, their appropriation of the companies' funds could not be regarded as dishonest. Section 2 is the interpretation section and it provides:

> 'Dishonesty' – (1) A person's appropriation of property belonging to another is not to be regarded as dishonest
> (a) ... or
> (b) if he appropriates the property in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it...

It was held:

(1) Where all the shareholders and directors of a company acted illegally or dishonestly in relation to the company their knowledge of, or consent to, the illegal or dishonest acts was not to be imputed to the company. Accordingly, the issue of whether the defendants had 'dishonestly' appropriated funds from the companies should have been left to the jury.

(2) Since the essence of the defendants' defence was that they and the company were one and the same, so that their consent was the same as the company's consent to the appropriations, it was not open to the defendants to rely on s 2(1)(b) of the 1968 Act by way of a defence, because it was not possible to regard the company as the 'other' person whose consent would be given. Moreover, even if s 2(1)(b) was available to the defendants as a defence, that would not have precluded the jury from finding that the defendants had acted dishonestly if they were satisfied that the defendants had not had an honest belief that the company would have consented to the appropriation and that the company's consent had not been its true

consent honestly obtained. Furthermore, unless the defendants had had an honest belief that they had been entitled to appropriate the companies' funds, they could not have honestly believed that the company had truly consented to the appropriation.

The Court of Appeal referred to *Belmont Finance Corporation Ltd* v *Williams Furniture Ltd*.[3] In that case it was alleged by the receivers of the company that its shareholders and directors had unlawfully and dishonestly conspired to use the company's funds to purchase shares in another company for an excessive price, and also to give financial assistance to the shareholders of that other company to purchase its shares in contravention of s 54 of the Companies Act 1948. Foster J dismissed the receivers' claim for damages, breach of trust and misfeasance, on the ground that in these circumstances the company must itself have been a party to the alleged conspiracies, with the result that the receivers could not maintain the action in its name. His decision was, however, unanimously reversed by the Court of Appeal. Buckley LJ said and Orr and Goff LJJ agreed with him (at p 126):

> ... the directors of the plaintiff (the company) must then have known that the transaction was an illegal transaction. But in my view such knowledge should not be imputed to the plaintiff, for the essence of the arrangement was to deprive it improperly of a large part of its assets. As I have said, the plaintiff was a victim of the conspiracy. I think it would be irrational to treat the directors, who were allegedly parties to the conspiracy, notionally as having transmitted this knowledge to the plaintiff;

Kerr LJ giving the judgment on the reference said (at p 223) there was no reason why the position in criminal law should be any different.

In this case the purpose of the scheme to draw out moneys from the companies was not only for the purpose of paying less income tax on the profits of the companies but also to enable them to make an earlier distribution of these profits. Instead of doing it in the proper way by declaring dividends, they had through means which were not denied to be irregular, sought to take out what they said were their entitlements as and when convenient.

How did they achieve this? They made use of Thian Jun Soon (PW2) an illiterate carpenter from Sarawak who at the material time was working in Singapore for SBCPL. Thian Jun Soon was asked to sign on blank cheque payment vouchers and on fictitious subcontractor's bills. Ficitious contracts, purportedly originating from the accounts department of SBCPL and WKCPL, were drawn up and Thian Jun Soon was asked to confirm these contracts. The second appellant brought Thian Jun Soon to open a current account with Overseas Union Bank. Two cheques for $66,000 (exh P40) and for $80,000 (exh P41) were paid into the account without the knowledge of Thian Jun Soon who never received these payments. All the cheques in question were made out in the name of Thian Jun Soon and except for one cheque, exh P46 for $2,200, all the other cheques were not received by him. Three of those cheques – for $20,850 (exh P37), $4,000 (exh P38) and $70,000 (exh P39) – were paid into the various bank accounts of the second appellant.

The scheme was improper, dishonest and illegal and was designed to benefit all of them and the two companies had suffered wrongful loss.

The defence that these sums represented 'profits' was untenable. The act of appropriation here was dishonest. The appellants had caused wrongful loss to SBCPL and WKCPL in that these two companies had paid out various sums of money as contractual payments when there were no such contracts. If these sums were taken as profits, the proper procedures in the Companies Act had to be followed. By secretly taking out these large sums of money for themselves, the appellants as agents of their companies had committed fraud on their own companies.

A director of a company should at all times act honestly in the discharge of the duties of his office (see s 157(1) of the Companies Act (Cap 50, 1985 Ed)). By s 199(1) of the same Act:

> The director of a company shall cause to be kept such accounting and other records as will sufficiently explain the transactions and financial position of the company and enable true and fair profit and loss accounts and balance-sheets ... to be prepared from time to time.

In this case by disguising these payments as payments to subcontractors, the appellants had not only caused wrongful losses to their respective companies, but they had also caused wrongful gains to themselves. Had the accounts been properly audited and a profit and loss account put up, their entitlements would have been less than what they had arrogated to themselves.

The trial judge was correct in his finding that the appellants had misappropriated the property of the companies and had acted dishonestly.

Mr Newman urged the court to reduce the sentences. He made four points:

(1) Nobody has suffered any loss as a result of the appellants' conduct.
(2) There has been considerable delay. The appellants were arrested over six years ago; charged in January 1983, convicted in April 1984 and appeal came up for hearing in July 1988.
(3) The appellants have effectively been prevented for a long period of time from doing any business at all because of the convictions.
(4) The public interest in seeing that the directors are aware of the requirements of the law can adequately be met by a financial penalty and not a custodial one.

The offences committed by the appellants are serious offences. Criminal breach of trust by an agent carries a severe penalty – imprisonment for life, or with imprisonment for a term which may extend to ten years and also a fine. The amount involved is very substantial. The appellants between them had dishonestly misappropriated $534,800. They did this over a period from January 1981 to March 1982. No restitution has been made.

I am of the view that a custodial sentence is called for in this case. I do not find that the sentences imposed by the trial court are manifestly excessive.

In the result these appeals are dismissed.

*Appeals dismissed.*

Solicitors: *Peter Yap & Co*; *Leo Fernando*.

Reported by *PS Ranjan*

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## Hawa bte Haji Mohamed Hussain v CJ Miranda

HIGH COURT (SINGAPORE) – MAGISTRATE'S APPEAL NO 463 OF 1985
LAI KEW CHAI J
30 AUGUST 1988

*Criminal Procedure – Respondent convicted on private summons brought by appellant – Dissatisfied appellant appealed against sentence passed on respondent – Public Prosecutor intervening to withdraw appeal – Whether appellant has right of appeal and right of audience – Whether Public Prosecutor has control and direction of criminal prosecutions – Discretion entrenched in art 35(8) of Singapore Constitution – Criminal Procedure Code (Cap 68, 1985 Ed), ss 247(1), 336(1), (8) – Constitution of the Republic of Singapore, art 35(8)*

The respondent was tried and convicted of the offence of voluntarily causing hurt to the appellant. The magistrate gave him a conditional discharge for one year. Not satisfied with what she considered to be a manifestly inadequate sentence, the appellant (who originally brought the private summons against the respondent) filed a notice of appeal under s 247(1) of the Criminal Procedure Code (Cap 68, 1985 Ed) ('the Code'). At the commencement of the hearing of the appeal, the deputy public prosecutor appeared and submitted that the notice of appeal should be rejected and that the Public Prosecutor was intervening to withdraw the appeal. The Public Prosecutor relied on art 35(8) of the Constitution for his submission, adding that s 247(1) of the Code should be read with s 336(1). The appellant, on the other hand, contended that on a reading of s 247(1), the appellant, being a 'party' to the criminal matter below, should not only have the right of appeal but a right of audience either by herself in person or by counsel.

**Held,** dismissing the appeal:

The Public Prosecutor under s 336(1) of the Criminal Procedure Code has 'the control and direction of ... proceedings under the Criminal Procedure Code and since the appeal before the court is a proceeding under the Criminal Procedure Code, the Public Prosecutor could properly in his discretion intervene and withdraw the appeal. His discretion is entrenched in art 35(8) of the Constitution.

**Case referred to**

1 *Ponniah* v *Lim* [1960] MLJ 152 (refd)

**Legislation referred to**

Constitution of the Republic of Singapore art 35(8)
Criminal Procedure Code (Cap 68, 1985 Ed) ss 128(1)(a), 129-132, 133(1), 247(1), 249, 336(1), (4), (5), (6), (8)
Legal Profession Act (Cap 161, 1985 Ed) s 28(1)

*B Ganesh* for the appellant.
*Rajan Nair* for the respondent.
*Ismail Hamid* for the Public Prosecutor.

*Cur Adv Vult*

**Lai Kew Chai J:** In Magistrate's Appeal No 463 of 1985 the petitioner, Hawa bte Haji Hussain, who brought a private summons against the respondent, appealed against the sentence on the ground that it was manifestly inadequate. The respondent was tried and convicted of the offence of voluntarily causing hurt to the appellant. The magistrate gave him a conditional discharge for one year from 22 November 1985. The proceedings were taken pursuant to a complaint under s 128(1)(a) of the Criminal Procedure Code (Cap 68, 1985 Ed) ('the Code') which complaint was examined under s 133(1) of the Code. Since the restrictions imposed by ss 129 to 132 of the Code did not apply, the appellant as the complainant was represented by counsel who appeared under s 28(1) of the Legal Profession Act (Cap 161, 1985 Ed).

Not satisfied with what she considered to be a manifestly inadequate sentence, the appellant who was only the complainant in the case filed a notice of appeal under s 247(1) of the Code which, being important for present purposes, is reproduced below:

> Subject to sections 242, 244 and 245 any person who is dissatisfied with any judgment, sentence or order pronounced by any District Court or Magistrate's Court in a criminal case or matter to which he is a party may prefer an appeal to the High Court against that judgment, sentence or order in respect of any error in law or in fact or, in an appeal against sentence, on the ground that the sentence imposed is manifestly excessive or inadequate by lodging within 10 days from the time of the judgment, or order being passed or made, with the Registrar of the Subordinate Courts at the court house at which the trial was held, a notice of appeal in triplicate addressed to the High Court.

Counsel for the appellant then referred to s 249 of the Code and contended that the Magistrate's Court was only obliged to, as it did, transmit to the respondent a signed copy of the record of proceedings and of the grounds of decision together with a copy of the notice and of the petition of appeal. The Public Prosecutor was not served with the papers. Counsel for the appellant stressed the disjunctive in s 249 of the Code which reads as follows: